

# National Family Justice Association

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November 29, 2006

## RE: MICHIGAN HOUSE BILL 5267 – SHARED PARENTAL RESPONSIBILITY

### AN OPEN LETTER

To All Concerned Michigan House Legislators:

Next month, the Michigan Legislature will once again take up legislation designed to place the responsibility for rearing and supporting our state's children squarely where it belongs...with both of their fit parents. For more than two decades now, policies and procedures used both in the state bureaucracy and the courts have served to maximize federal funding sources at the expense of Michigan's children and their families. This occurs via federal Title IV Welfare [of the Social Security Act] incentive funds earned largely through the forced segregation of one parent (mostly fathers) from his/her children during divorce, child protection, foster care and adoption proceedings. As a result, with only a fourth of California's total population, Michigan amazingly has 42% of its 2.5 million families in Title IV-D (child support) programs compared to only 18% of California's families firmly establishing Michigan as having the largest per capita participation of families with minor children in the federal Title IV-D program in the nation.

While all branches of state government can be held accountable for expanding the Title IV-D welfare program to include any and all private cases where there is absolutely no compelling state interest, the state legislature can be considered a primary culprit. However, the state legislature is presented with yet another opportunity this legislative session to reverse course and place our state in a forward direction for prosperity.

Michigan's **Shared Parental Responsibility Bill (HB 5267)** seeks to restore true shared parenting responsibilities to both parents of minor children in legal custody disputes...unless a parent is otherwise proven unfit, unwilling, or unable to care for the child.

In doing so, this significant legislation recognizes the numerous research studies that show children fair far better emotionally, behaviorally, and educationally when both their fathers and mothers remain significantly involved in their lives via shared custody arrangements despite the separated households. A consequence of **HB 5267** will likely be reduced crime and disorder in our state over the ensuing years and decades.

Additionally, the bill minimizes school schedule interruptions for the affected children and protects the guarantee provided by the U.S. Constitution and affirmed by several U.S. Supreme Courts that **parents [plural] have a fundamental right to the care, custody, and control of the rearing and upbringing of their children...and that strict scrutiny and a compelling state interest is required before the state can interfere with parental rights.** [Note, more federal funding does not constitute a compelling state interest]

*"Protecting America's Greatest Resource...our Families™"*

Since the 1980's, Michigan and some other states have usurped the protected equal rights of parents to their children by implementing designations of "custodial" and "non-custodial" parents in order to justify the inclusion of "never-assisted" middle-class parents into the welfare system and thus 'qualify' the state for increased federal funding and incentives. This process was documented a "Fleecing of America" in a 1995 General Accounting Office (GAO) report to Congress but nonetheless has continued unabated. Inasmuch as the Michigan Department of Human Services demands the largest state budget along with the Department of Education, **House Bill 5267** will undoubtedly serve to place more of the responsibilities where they rightly belong...with the parents and not the state; thereby reducing Michigan's welfare burden and our chronic budget-balancing crisis.

Finally, during our recent state electoral process, nearly every candidate for public office promised to create or bring jobs into our state. Sadly, none of these candidates seemed willing to admit that despite many positives in our state, the negatives will always gleam larger in the minds of prospective or relocating employers. Michigan's overall excessive crime rates and rapidly decreasing quality of life factors will likely continue to discourage new employment growth in the near term, especially in our state's larger urban centers. The long-term solution to this problem is as old as humankind itself...our families! Research demonstrates that family disruptions created by divorce, single-parent households, and other child/father *non-access* promote significant behavioral problems that lead to violence, crime, and incarcerations especially among minority concentrated populations. This phenomenon has created a self-perpetuating 'vicious cycle' of crime and violence as fewer dual-parent family environments are formed. As perhaps it is an unintended consequence, but Michigan state government has heretofore served to perpetrate the civil rights issue of the 21<sup>st</sup> century...fatherless minority children!

**"We at NFJA wholeheartedly support HB 5267 and believe astute, judicious Michigan legislators will also support this bill while the prejudicial, status-quo legislators will likely oppose it."** Will you be counted among the former?

Submitted by:



Murray Davis  
Board President

The National Family Justice Association is a tax-exempt 501(c)(3) non-profit educational organization which researches, educates, and advocates regarding relevant public issues affecting children and their families.

Cc: Jane Spies, executive director

#### Notable Quotations

"Evil triumphs when good men do nothing."... *Sir Edmund Burke, the great 18th-century Scottish philosopher and British parliamentarian*

"I have come to believe that the one thing people cannot bear is a sense of injustice. Poverty, cold, even hunger, are more bearable than injustice"... *Millicent Fenwick, US diplomat & congresswoman*

**"Protecting America's Greatest Resource...our Families™"**

## CHILD OUTCOMES OF INVOLVED FATHERS

By Kyle D. Pruett, M.D.  
Family Psychiatrist and Author  
Yale University Child Study Center

### **Behavioral**

- Reduced contact with the juvenile justice system
- Delay in initial sexual activity & reduced teen pregnancies
- Reduced rate of divorce
- Less reliance on aggressive conflict resolution and reduced domestic violence

### **Educational**

- Higher grade completion and income potential
- Greater math competence in girls
- Greater verbal strengths in both boys and girls

### **Emotional**

- Greater problem-solving competence
- Greater stress tolerance
- Greater empathy and moral sensitivity
- Reduced gender stereotyping

***The Question posed to several of the nation's top social science researchers by Murray Davis:***

"Considering: a) the recent Quitno Press Awards finding cities such as Detroit with large segregated African-American populations among the most dangerous in the country, b) the large percentage (70%) of single-parent family households among African-Americans headed by mothers, and c) the large percentage (65%) of African-American fathers *involuntarily* excluded (e.g. segregated) from their children's lives by systematic state processes and procedures...***is it possible your prior research may have also inadvertently uncovered a tangible connection between African-American violence and fatherlessness as well?***"

see Morgan Quitno Press at: <http://www.morganquitno.com/cit03pop.htm#500,000+>

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[the email reply to: M. Davis, Dads of Michigan, 1/21/03]

**RE: FAMILY DISRUPTION AND SOCIETAL VIOLENCE**

Mr. Davis... "A growing body of research suggests a vicious cycle linking family disruption and violence. A high prevalence of single-family households in a community is associated with high rates of violence, especially among males. Moreover, widespread involvement in violence on the part of males distorts marriage markets (in part through incarceration policies) and increases the likelihood of single-parent families. These processes have had a particularly strong impact within the African American community, although they seem to apply more generally. Breaking the cycle is clearly a profound challenge for the nation" ... SFM, 1/21/2003



# PARENTING AS A FUNDAMENTAL RIGHT



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**"The interest of the parents in the care, custody, and control of their children - - is perhaps the oldest of the fundamental liberty interests recognized by this Court."**

*U.S. Supreme Court, 2000*

**"Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgement and experience. The child does not forfeit these rights when the parents divorce."**

*Judge Dorothy T. Beasley,  
Georgia Court of Appeals,*

**"In the Interest of A.R.B., a Child," July 2, 1993**

## Introduction

Supreme court decisions have found that "the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." Because a fundamental right cannot be denied without a compelling state interest that cannot be achieved by any less restrictive means, some legal scholars believe that, in the absence of abuse or neglect, parents have a right to both legal and physical joint custody. The argument is straightforward:

(1) A parent's right to raise a child is a constitutionally protected liberty interest. This is well established constitutional law.

(2) State's granting of sole custody is sufficiently intrusive to warrant scrutiny, i.e., granting sole custody to one parent impinges on the rights of the other parent to a significant extent. This is obvious to the most casual observer. A parent whose time with a child has been limited to the typical four-days-per-month visitation clearly has had his or her rights to raise that child severely restricted.

(3) The compelling state interest in the best interest of the child can be achieved by less restrictive means than sole custody. A quarter-century of research has demonstrated that joint physical custody is as good or better than sole custody in assuring the best interest of the child.

This collection of data has been assembled to assist children's advocates in securing a child's rights to both parents through legislation or litigation.

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## PARENTING AS A PROTECTED CONSTITUTIONAL RIGHT

Don Fischer

March 8, 2001

The U.S. Supreme Court long ago noted that a parent's right to "the companionship, care, custody, and management of his or her children" is an interest "far more precious" than any property right. *May v. Anderson*, 345 U.S. 528, 533, 97 L. Ed. 1221, 73 S.Ct. 840, 843 (1952). In *Lassiter v. Department of Social Services*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 120 S.Ct. 2153, 2159-60 (1981), the Court stressed that the parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest protection.'" quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 31 L. Ed 2d 551, 92 S. Ct. 1208 (1972)

In *Troxel v. Granville*, 527 U.S. 1069 (1999) Justice O'Connor, speaking for the Court stated,

"The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of the law.' We have long recognized that the Amendment's Due Process Clause like its Fifth Amendment counterpart, 'guarantees more than fair process.' The Clause includes a substantive component that 'provides heightened protection against governmental interference with certain fundamental rights and liberty interest' and 'the liberty interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interest recognized by this Court.'"

Justice Thomas concurring in the majority's opinion said, "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights."

This is not to say that courts should blindly or automatically impose joint custody arrangements. Clearly, there are many situations where joint custody is neither appropriate nor practical. Whenever a parent-child relationship is restricted by a family court order such restrictions must be done in the least restrictive manner. The standard that most states apply in deciding child custody is "the best interest of the child". The CRC does not believe that such a standard should be done away with, however, CRC believes such a standard should be balanced with parental rights. As we find in *Reno v. Flores*, 507 U.S. 292, 301 (1993)

'The best interest of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion -- much less the sole constitutional criterion -- for other, less narrowly channeled judgments involving children, where their interest conflict in varying degrees with the interest of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately.

Similarly, "the best interest of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of the child is met, the interest of the child may be subordinated to the interest of other children, or indeed even to the interests of the parents or guardians themselves. "The best interest of the child" is likewise not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes, which must be reconciled with many other responsibilities.

Narrow tailoring is required when fundamental rights are involved. Thus, the state must show adverse impact upon the child before restricting a parent from the family dynamic or physical custody. It is apparent that the parent-child relationship of a married parent is protected by the equal protection and due process clauses of the Constitution. In 1978, the Supreme Court clearly indicated that only the relationships of those parents who from the time of conception of the child, never establish custody and who fail to support or visit their child(ren) are unprotected by the equal protection and due process clauses of the Constitution. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Clearly, divorced parents enjoy the same rights and obligations to their children as if still married. The state through its family law courts, can impair a parent-child relationship through issuance of a limited visitation order, however, it must make a determination that it has a compelling interest in doing so. Trial courts must, as a matter of constitutional law, fashion orders which will maximize the time children spend with each parent unless the court determines that there are compelling justifications for not maximizing time with each parent.

Maximizing time with each parent is the only constitutional manner by which a parent is able to maintain a meaningful parent-child relationship after divorce. While geographic distance, school schedules and the like must be factored into the custody and visitation calculus, trial courts faced with a custody and visitation decision must accord appropriate constitutional respect to maintain a healthy parent child relationship by granting each parent as much time as possible with the child under the circumstances of each case.

The federal Due Process and Equal Protection rights extend to both parents equally, for example, in adoption proceedings. In *Caban v. Mohammed*, 441 U.S. 380, (1979) the Supreme Court found that a biological father who had for two years, but no longer, lived with his children and their mother was denied equal protection of the law under a New York statute which permitted the mother, but not the father, to veto an adoption. In *Lehr v. Robinson* (1983) 463 U.S. 248, the Supreme Court held that "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by com[ing] forward to participate in the rearing of his child," *Caban*, [citations omitted], his interest in personal contact with his child acquires substantial protection under the Due Process Clause." (Id. at 261-262)

Clearly the "best interests of the child" standard is to be read in light of the requirement that the parental-child relationship remain intact. Nor should the natural father's federal constitutional rights depend upon the identity of the person attempting to infringe upon them. That is, the threshold showing required to impinge upon a parent's relationship with one's children should not be less when married than when unmarried. One's rights should not be less when the biological mother seeks to attack the protected relationship than when a potential adopter seeks to attack that relationship. The courts have clearly held that the degree of protection afforded parental rights does not depend upon the relationship between the mother and the father. Simply, the protection afforded the parent-child relationship is not lessened because the relationship between the parents has been altered by marital dissolution. In every circumstance under which a parental right to physical custody may be terminated in which the courts have spoken on the standard of proof to be applied, the holding has been that the proof must be by clear and convincing evidence. In those cases where joint physical custody is not ordered in a divorce setting, the parent without custody has been deprived of physical custody, just as in any other setting. The identity of the person who has custody of the child is irrelevant to the requisite proof required to deprive one parent of physical custody. Surely an action to determine whether a parental right should be retained is as fundamental to the parent child relationship as an action to terminate that relationship.

The impact these judicial decisions have on the lives of all concerned cannot be overestimated. Childhood passes rapidly and it quickly becomes too late to unring the bell. Expanded visitation or joint custody may seem unimportant, but only to those who have never experienced the hollow time of forced separation. "No human bond is of greater strength than that of parent and child" *Michelle W. v. Ronald W.*, 39 Cal. 3d354 (1985). Seton Hall Professor Holly Robinson has spelled out this argument in detail:

It is accepted constitutional doctrine that the due process clause of the Fourteenth Amendment protects interests that are recognized as constituting "life" or Property". In a number of decisions, the Supreme Court has recognized that individuals possess a fundamental liberty interest -- entitled to constitutional protection -- regarding such matters as the decisions whether to have children, decisions concerning the upbringing of children, and the retention of their children through exercise of custody. Read together, the cases clearly establish a zone of privacy around the parent-child relationship, which only can be invaded by the state when the state possesses a sufficiently compelling reason to do so. As a result, when the marital breakdown occurs, both parents are entitled to constitutional protection of their right to continue to direct the upbringing of their children

through the exercise of custody. Adequate protection of this parental right requires that parents be awarded joint custody [or expansive visitation]...unless a compelling state interest directs otherwise. H.L. Robinson, "Joint Custody: Constitutional Imperatives", 54 Cinn. L. Rev. 27, 40-41 (1985) (footnotes omitted). See also, Ellen Cancakos "Joint Custody as a Fundamental Right". Arizona Law Review, Vol. 23, No. 2 (Tucson, Az: University of Arizona Law College), Tuscon, 95721. See also, Cynthia A. McNeely: "Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court", 25 Fla. St. U.L. Rev. 335, 342+ (1998)

This proposition that the parent-child relationship in a traditional custody and visitation dispute commands constitutional respect is admittedly lacking a long life of specific case authority approving it. This lack of specific case authority is not fatal to the proposition's vitality. At least one federal court has found that the paucity of cases recognizing the constitutional sanctity in the past. That court further held that the historical absence of a strong tradition should not result in denial of the constitutional protection for such relationships as they become increasingly prevalent. See *Franz v. United States*, supra.

To further underscore the need for courts to consider the constitutional protections which attach in family law matters, one need only look to recent civil rights decisions. In *Smith v. City of Fontana*, 818 f. 2d 1411 (9th Cir. 1987), the court of appeals held that in a civil rights action under 42 U.S.C. section 1983 where police had killed a detainee, the children had a cognizable liberty interest under the due process clause.

The analysis of the court included a finding that " a parent has a constitutionally protected liberty interest in the companionship and society of his or her child. Id. at 1418, citing *Kelson v. City of Springfield*, 767 F. 2d 651 (9th Cir. 1985). In *Smith* the court stated " We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents." Id.

A failure to accord appropriate constitutional respect to the parent-child relationship between the parties herein and the minor child by failing to award joint custody or substantial parental contact would be error. We respectfully request that this Court fashion a court order which will maximize the available time the minor will spend with each parent.

### CONCLUSIONS

Given the long history of cases by the Supreme Court it can no longer be doubted that the child's best interest must be weighed with a parent's fundamental liberty interest in parenting their child without undue interference by the state. Custody orders must bear sufficient respect for the constitutional protections inherent in the parent-child relationship.

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## Law Journal Articles and Public Policy Documents

Daniel Lee, "[Family Law and the Collapse of Culture](#)", *Free Congress Commentary*, July 24, 2001.

- "Attorneys reading this may protest, "but there will be chaos if a primary custodian isn't designated!" I think not, but besides that due process requires that where fundamental rights are at stake there cannot be an automatic infringement on them. Rather the burden is on the state to prove its compelling interest (substantial harm) in each individual instance prior to considering the remedy (means has a very tight fit with the ends). If it is found the child is in substantial harm, the court must then issues orders as narrow as possible. That precludes any nationwide policy as exists today to award every other weekend visitation and two or so weeks in the summer."
- "Family law is a symptom of a sickness in the body politic. It can spread and be fatal, or can be cured. To date few persons have been aware of it, although parents in the homeschool movement seem to be taking



a preemptive action to remove their children from the state's grasp. But it is probably now clear to all, the substantial harm standard is what protects these homeschooling parents too. Without it the state can dictate what they may and may not teach their children. As in other areas of family law destroy the substantial harm standard, and so too do these and other protections disappear."

Walther, Christopher D. "Wisconsin's Custody, Placement, and Paternity Reform Legislation," *Wisconsin Lawyer*, Vol. 73, No. 4, April 2000

- "The changes to custody and placement law attempt to strike a delicate balance between the constitutionally protected rights of parents to raise their children without undue state interference, and the best interests of their children, who are the innocent victims of the breakup of their parents' relationship. "
- "The law now is harmonized so that parents in custody disputes with each other enjoy the same rights they already enjoyed under established law governing custody disputes with third parties. In the 1984 third party (grandparent) custody case, *Barstad v. Frazier*,<sup>1</sup> the Wisconsin Supreme Court held: "Under ordinary circumstances, a natural parent has a protected right under both state law and the United States Constitution to rear his or her children free from governmental intervention. Absent compelling reasons narrowly defined, it is not within the power of the court to displace a fit and able parent simply because in the court's view someone else could do a 'better job' of 'parenting.'" A parent's right to custody of his or her child originates from state law and the U.S. Constitution, and not from an award of custody by a court. A court now has limited authority to take away that right absent extraordinary circumstances."

Hubin, Donald C., "Parental Rights and Due Process," *Journal of Law and Family Studies*, vol. 1, no. 2. University of Utah, 1999. pp. 123-150.

- "The U.S. Supreme Court regards parental rights as fundamental. Such a status should subject any legal procedure that directly and substantively interferes with the exercise of parental rights to strict scrutiny. On the contrary, though, despite their status as fundamental constitutional rights, parental rights are routinely suspended or revoked as a result of procedures that fail to meet even minimal standards of procedural and substantive due process. This routine and cavalier deprivation of parental rights takes place in the context of divorce where, during the pendency of litigation, one parent is routinely deprived of significant parental rights without any demonstration that a state interest exists—much less that there is a compelling state interest that cannot be achieved in any less restrictive way. In marked contrast to our current practice, treating parental rights as fundamental rights requires a presumption of joint legal and physical custody upon divorce and during the pendency of divorce litigation. The presumption may be overcome, but only by clear and convincing evidence that such an arrangement is harmful to the children."

McNeely, Cynthia "Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court", *Florida State Law Review*, September, 1998.

"A claim that fundamental rights have been violated requires the reviewing court to apply strict, rather than intermediate, scrutiny. Thus, the state would need to show a necessary and compelling interest to justify its interference with the father's fundamental right. This argument might best be raised in a situation where both parents are fit, reside in the same community, and are suitable for rotating or joint physical custody, yet the trial court awards the mother primary residential custody and the father visitation of every other weekend.[307] When an activity is constitutionally protected, as is the fundamental right to parent, a state must choose the least restrictive means possible to achieve its goal.[308] Absent good cause, it would appear that the court, in this situation, would be interfering with the father's fundamental right to parent his child; the father, then, should be entitled to a review of strict scrutiny. "

Henry, Ronald K., "Divorce Reform and the Fathers' Movement", Congressional Testimony.

"From birth and throughout the marriage, the law recognizes that the child has two parents. Both of these parents have unrestricted access and equal custodial rights with respect to the child. A custody decree is an order which restricts parents' access and custodial rights with respect to the child and like any other injunction, enjoins the parents from the exercise of their former, unrestricted rights.

12/5/2006

HOME

## THE TRUTH About Joint Custody

### CONTRARY TO EXTREMIST CLAIMS MADE ABOUT JOINT CUSTODY ...

**Joint custody reduces conflict** because both parents are able to maintain a strong relationship with their children.

If you were only allowed to see your child four days a month, how would you feel? Conflict is almost inevitable when

one parent fights for sole custody, denying the other parent a role in raising the child. Sole custody causes conflict, while joint custody helps to reduce it.

**Joint custody helps parents cooperate for the sake of the children.** Custody battles are, of course, about who will raise the child. When both parents are able to maintain their role as parents, instead of one parent and one "visitor", they can focus on what is best for the child, rather than fighting to either retain control as the only parent, or to regain their role as a parent.

**Joint custody is not a panacea**, but it is so effective in maintaining a child's relationship with both parents that outcomes for children are *much* better than for sole custody, and in most ways do not differ from an intact family.

**Children do best when they are able to retain a relationship with both parents.** Most parents recognize the importance of both being involved in raising their children. Active involvement of both parents is just as important if parents are separated or divorced.

**Joint physical custody does not reduce material and financial support for children.** Financial child support is determined using a sliding scale to adjust for time spent with parents and differences in parent incomes.

Allowing

both parents to remain involved means money can be spent on the children, rather than costly legal battles.

**Joint custody most closely resembles an intact family.** Children unavoidably have two homes as a result of divorce, but they do best when they can keep the emotional ties with both parents - because they have *two parents*,

instead of one "real parent" and one "former parent." Emotional ties and family relationships are more important than geography.

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Following are excerpts from the **American Psychological Association report** to the US Commission on Child and

Family Welfare, which is public record. The full report and more recent research can be found on the CRC research page [here](#).

## Empirical Research describing Outcomes of Joint Custody

### American Psychological Association

#### Best Interest of the Child Standard

The research that included child adjustment criteria concerning the study of joint custody will be used relevant to this issue. The two studies with the best methodology (Buchanan, Maccoby, & Dombush, 1991; Burnett, 1991) indicated that joint custody versus sole maternal custody was associated with adolescents' positive adjustment. This finding was replicated for children by Abarbanel (1979), Greif (1979), and Luepnitz (1986) but not Johnston, Kline & Tschann (1989) and Kline, Tschann, Johnston & Wallerstein (1989). **It is concluded that the present research supports joint custody for facilitating children's adjustment.**

**Child Support**

Kelly (1994) pointed out that feminists are opposed to joint custody due to concern that child support to mothers will be reduced when compared to sole maternal custody. The consensus of studies that addressed this issue found that **child support to mothers is either increased in joint custody families or not significantly different from those with sole maternal custody** (Arditti, 1992a; Emery & Wyer, 1987; Emery, Matthews, & Wyer, 1991; Luepnitz, 1986; and Shrier, Simring, Shapiro, 1991).

**Relitigation and Costs to the Family**

The emotional and financial relitigation costs to families and judicial systems is often cited by both proponents and opponents regarding joint custody. The studies reviewed that investigated this issue consistently indicated **decreased relitigation for joint custody** versus sole maternal custody (Dudley, 1991; Emery & Wyer, 1987; Emery, Matthews, & Wyer 1991; and Luepnitz, 1986).

**Parental Conflict**


The replicated finding and the weight of evidence were that **joint custody results in either less or no greater conflict** than sole maternal custody (Albiston et al., 1990; Arditti, 1992a; Buchanan et al., 1991; Burnett, 1991; Greiff, 1979; Kline et al., 1989; Luepnitz, 1986; and Maccoby et al., 1990). The earlier review of decreased relitigation for joint custody versus sole maternal custody also supports this conclusion. The sole exception to these findings was by Johnston, Kline and Tschann (1989) but as Ferreiro (1990) pointed out, this study included a biased sample of divorced families referred due to high conflict.

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## townhall.com

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### **Fight for paternal custody rights proving popular**

Phyllis Schlafly (back to web version) |  Send

January 10, 2005

One impressive Nov. 2 vote has been overlooked by the media. By 85 percent to 15 percent, a ballot initiative in Massachusetts approved equal legal and physical custody of children whose parents are divorced.

That ballot initiative is nonbinding, but it certainly is indicative of the will of the people and the growing recognition that children are best off under the care of both parents. The initiative came out of the grass roots following a massive signature-gathering effort during the summer.

The proposition appeared on the ballot as follows:

*Shall the State Representative from this district be instructed to vote in favor of legislation requiring that in all separation and divorce proceedings involving minor children, the courts shall uphold the fundamental rights of both parents to the shared physical and legal custody of their children and the children's right to maximize their time with each parent, so far as is practical, unless one parent is found unfit or the parents agree otherwise, subject to the requirements of existing child support and abuse prevention laws?*

This initiative was sponsored by a fathers' rights group whose members believe fathers are systematically discriminated against by family courts, which nearly always award physical custody to the mother even when the father has committed no fault. Family courts typically deny faultless fathers their equal parental rights even when state law appears to require equal custody.

California Family Law, for example, states (Sec. 3010(a)): "The mother ... and the father ... are equally entitled to the custody of the child." The only specific examples the statute gives for denying custody to a parent are child abuse, false accusations of child abuse, abuse of someone else with whom the person has a domestic relationship, substance abuse, and conviction of certain felonies.

Laws about custody rights vary from state to state, and only about a dozen states specify a legal presumption in favor of equal custody. Iowa's new law says that if a court denies a request for joint physical custody, the judge must explain why it's not in the best interest of the child.

Whether or not a state law mandates equal rights to both parents, family courts appear instead to rely on a concept called "the best interest of the child." Because that notion is wholly subjective, an indefinable rule with no standards or accountability, in practice it rests on the

personal whim or bias of the family court.

Family court judges find unwelcome the task of rendering a judicial decision detached from the law and from any due-process finding of fault, so they call on court-appointed psychologists to provide opinions of which parent should have custody. But the issue before the court is not psychological (except in rare cases of mental illness), and the psychologist's credentials no more qualify him to determine what is "the best interest of the child" than the judge - or the father or mother.

The social ills caused by the lack of a paternal role model and discipline dispenser in the home have been voluminously reported. We've been led to believe that the plight of fatherless children is caused by husbands walking out on their wives, fathers abandoning their children and deadbeat dads.

That might be a primary cause in the matriarchal welfare system, but no evidence supports a claim that large numbers of non-welfare fathers are voluntarily abandoning their children. Thousands, perhaps millions, of middle-class children are growing up fatherless because family courts have deprived them of fathers.

One of the best-kept secrets in American society today is that two-thirds of divorces are sought by wives, not husbands. The feminist movement has taught wives they can seek "liberation" by walking out on the marriage contract and marital duties and still reap the benefits of marriage - their children and his money.

Some 80 percent of divorces are involuntary, that is over the objections of one spouse. Very few of these divorces involve grounds such as desertion, adultery or abuse.

We urgently need a comprehensive study of how many family court decisions deprive fathers of their parental rights and deprive children of their fathers, when that awesome punishment is not based on any finding of fault. Information is difficult to gather because most of what family courts do is unavailable to public scrutiny.

How many children are separated by judicial fiat from involuntarily divorced fathers who have done nothing wrong? How many children are separated from their fathers because of questionable child abuse accusations without any evidentiary hearing or due process of law?

Fathers are starting to fight back. During 2004, federal class-action suits were filed against 46 states on behalf of an estimated 25 million non-custodial parents, primarily fathers, claiming violation of their right to equal custody of their children.

The gay-rights lobby has a national strategy based on federal "equal protection" to get their day in court to demand marriage licenses. What we really need are laws ensuring that children of broken homes have equal access to their fathers and mothers.

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M I C H I G A N

# CUSTODY GUIDELINE



FRIEND OF THE COURT BUREAU/STATE COURT ADMINISTRATIVE OFFICE  
MICHIGAN SUPREME COURT  
[www.courts.michigan.gov](http://www.courts.michigan.gov)

## Introduction

The Custody Guideline contains information addressing many of the issues associated with establishing and modifying custody. It also provides information relevant to the most common custody arrangements. Although the Custody Guideline provides information on numerous subjects, the reader is reminded that the information presented is not a listing of all the subjects and issues relevant to custody.

Child custody is a term that refers to rights and responsibilities for each parent and child. Custody is not a term used to indicate ownership, but rather a determination of the time a child is going to be with each parent and each parent's responsibility to make decisions on behalf of the child. Custody can be modified to accommodate significant changes in the lives of the children or the parents involved. The judge attempts to structure custody to promote a strong relationship between children and their parents. The only time this is not true is when the judge determines that custody with a particular individual would endanger the child's physical, mental, or emotional health.

In custody matters, judges are asked to decide who will make decisions for a child and when a child is going to be with each parent. If parents in custody cases have not reached an agreement, the judge is asked to determine when a child is going to be with each parent. However, parents in custody cases who decide to work together can decide the custody agreement with the help of their attorneys, the help of the friend of the court office, and/or the process of mediation. Parents can, on their own, also work through the court system to obtain or modify custody by filing the proper paperwork.

There are several custody arrangements that can be agreed upon by parents or ordered by the judge. However, in custody disputes parents must be advised of joint custody. At the request of a parent the judge must consider awarding joint custody and must state during a hearing the reasons for granting or denying the request. The judge must decide if joint custody is in the best interests of the child. The judge could award joint custody and equally divide the time the child spends with each parent. However, the judge could also award joint custody and not equally divide the time the child spends with each parent. For example, the judge could award joint custody, with one parent having physical custody during the school year and the other parent having physical custody during the summer vacation period.

**NOTES TO THE READER:** This document (with the exception of the *Factors of the Child Custody Act*) uses the term, "parent." At times some one other than a parent will be involved in a custody dispute. Many concepts, aspects, and laws apply the same to third persons as they would to parents, but there are also some differences. Information regarding third persons having custody are explained later in this document.

"Judge" will be used throughout this document. Judges make decisions about custody, parenting time, and child support. When judges make decisions, the decisions are written down and signed by the judges. These are called court orders. Many publications use the term court instead of judge. This is done because courts are the institutions that interpret and enforce laws, and judges are the persons who have the responsibility to make court orders. There is also a person called a "domestic relations referee." This person makes recommendations for an order about custody, parenting time, and child support. That recommendation becomes an order of the court when approved by a judge. There are other important differences between a domestic relations referee, friend of the court employee, and judges. Those differences are explained later in this document.

Throughout this document there are references to the laws. When someone is citing a law, that person tells where the law can be found (called a citation). For example, the citation for the Child Custody Act is MCL 722.21. The MCLs are where all the laws for the state of Michigan can be found. The citation for rules about transferring cases is MCR 3.212. MCR stands for Michigan Court Rules. The MCRs are where all the rules for Michigan courts can be found. In this document the Michigan Court Rules will be referred to as MCR.

## Definitions of Custody

Judges can order different custody arrangements. Parents can agree to a custody arrangement and judges will usually sign the court order for the arrangements as long as they believe the agreement is in the best interests of the child. The following are descriptions of various custody arrangements.

**SOLE CUSTODY:** There is no legal definition for sole custody. For the purpose of the Michigan Custody Guideline, sole custody occurs when primary physical custody and legal custody are given to one parent. Physical custody is when a parent provides most of the day to day care for the child. Legal custody is when a parent has the responsibility of making all major decisions regarding the child's upbringing (such as medical treatment, school enrollment, religious instruction, and participation in extracurricular activities). If the judge believes the parents cannot work together for the benefit of their child, sole custody is usually awarded to one parent. The other parent may be given parenting time, as determined by the court. If parenting time is ordered, the non-custodial parent is responsible for making routine and emergency decisions for the child during parenting time.<sup>1</sup>

**JOINT CUSTODY:** At the request of either parent, the court must consider ordering joint custody. If the parents agree on joint custody, the court must order it unless the court determines that joint custody is not in the best interests of the child. When deciding, judges must state on the record their reasons for granting or denying the request. Judges may consider joint custody without a parent's request. In addition to the normal factors considered when deciding custody, with joint custody judges must also consider whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.<sup>2</sup> The statute defines joint custody in a way which provides for joint legal custody, joint physical custody, or a combination of joint legal and joint physical custody.

### THE FOLLOWING ARE 2 TYPES OF JOINT CUSTODY:

**JOINT LEGAL CUSTODY:** Joint legal custody means that parents share decision-making authority as to the important decisions affecting the welfare of the child.<sup>3</sup> Joint custody does not depend on the amount of time the child is with each parent.

<sup>1</sup> In particular, the Child Custody Act, MCL 722.27(4) gives a parent exercising parenting time the right and duty to decide all routine matters concerning the child. Joint custody is defined in the Child Custody Act, MCL 722.26a(7). All custody is slightly impacted by provisions on parenting time

(Child Custody Act, MCL 722.27a). There have been major court decisions that have impacted what major decisions are and the difference between joint legal and physical custody (*Lombardo v. Lombardo*, 202 Mich App 151, 507 NW2d 788 (1993), *Fisher v. Fisher*, 118 Mich App 227, 324 NW2d 582 (1982), *Miesner v. Miesner*, 183 Mich App 430, 415 NW2d 6 (1987), *Arata v. Kasan*, 156 Mich App 706, 402 NW2d 77 (1986) *Wickman v. Wickman*, 203 Mich App 277, 512 NW2d 68 (1994), and *Dugerson v. Dugerson*, 175 Mich App 77, 437 NW2d 318 (1989).

<sup>2</sup> Child Custody Act, MCL 722.26a(1)(b)

<sup>3</sup> Child Custody Act, MCL 722.26a(7)(b)



**JOINT PHYSICAL CUSTODY:** Means that there will be specific times when each parent will have the child with them.<sup>4</sup> However, it does not mean the parents will necessarily share decision-making authority unless the judge also has ordered joint legal custody. As an example of joint physical custody, one parent could have physical custody during the school year, alternate weekends, and alternate holidays, with the other parent having physical custody during the summer months, alternate weekends, and alternate holidays. If the judge awards joint physical custody, the court order will usually include a statement regarding when the child shall reside with each parent. The court order may provide that physical custody be shared by the parents to make sure the child has contact with both parents. During the time a child resides with a parent, that parent decides all routine and emergency matters concerning the child.

## Factors in the Child Custody Act

Parents are encouraged to reach their own agreements regarding custody arrangements. When parents cannot agree, the judge must decide custody by considering all of the following best interests factors of the Michigan Child Custody Act.<sup>5</sup> These factors are usually addressed during custody evaluations by the friend of the court. The following are the factors of the Child Custody Act:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and the continuation of the education and raising of the child in his or her religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed at or witnessed by the child.
- (l) Any other factor considered by the court to be of relevance to a particular child custody dispute.

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<sup>4</sup> Child Custody Act, MCL 722.26a(7)(a)

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<sup>5</sup> Child Custody Act, MCL 722.23

## Established Custodial Environment

Before ruling on custody, the judge must determine whether an established custodial environment exists. "The law states, The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered."<sup>6</sup>

If the judge determines that a custodial environment has been established, judges can only change custody if it is clear and convincing that there has been significant change in circumstances and that the custody change is in the best interests of the child.<sup>7</sup> It does not have to be clear and convincing to the judge to change custody if no established custodial environment existed. It is important to note that just because a child is living with a parent, that does not necessarily mean that an established custodial environment exists. A parent may have custody, but that does not mean the child looks to only that parent to provide guidance, discipline, the necessities of life, and parental comfort. It should also be noted that both parents may have established custodial environments with the child because they have provided guidance, discipline, the necessities of life, and parental comfort for the child.

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<sup>6</sup> Child Custody Act, MCL 722.27(1)(c)  
<sup>7</sup> Child Custody Act, MCL 722.27(1)(c)

## Children Deciding Where They Want to Live

Factor (f) of the Child Custody Act, states, "the reasonable preference of the child, if the court considers the child to be of sufficient age to express preference." "The mere expression of a child's preference is only one consideration. The judge must determine if the child is of an age and maturity to indicate "reasonable preference." "Reasonable" is not always easy to determine. Some of the aspects the judge may consider when deciding reasonable are:

**AGE OF THE CHILD.** As children grow older, they generally have a greater understanding of the circumstances surrounding the court proceedings. Judges will allow children to express a preference. However, children cannot legally choose where to live until they have reached the age of 18 or are determined to be emancipated.

**CONSISTENCY OVER TIME.** Judges will look to see if the children have had a history of expressing a reasonable preference. Judges would consider whether the child's preference was based on the fact the child just recently spent an extended period of time with either the mother or father.

**Does the child understand the choice that he or she is making.**

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<sup>8</sup> Child Custody Act, MCL 722.23